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Criminal

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

PAUL CASPARI, Superintendent,
Missouri Eastern Correctional Center,

and

JEREMIAH W. NIXON,
Attorney General of Missouri,

PETITIONERS,

v.

TERRY D. McINTYRE,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COUURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED

WHETHER A FEDERAL COURT MAY REVIEW A STATE COURT'S ERRONEOUS APPLICATION OF THE DOUBLE JEOPARDY CLAUSE.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 570.010, RSMo 1986, provides:

> As used in this chapter:
>
> ...
>
> (2) **"Appropriate"** means to take, obtain, use, transfer, conceal or retain possession of.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case as it appears in the Petition for Writ of Certiorari.

ARGUMENT

WHETHER A FEDERAL COURT MAY REVIEW A STATE COURT'S ERRONEOUS APPLICATION OF THE DOUBLE JEOPARDY CLAUSE.

Petitioners raise two issues in their Petition for Writ of Certiorari. The first addresses the question of whether a federal court may review a decision by a state court which requires an application of Constitutional law. The second issue questions whether the Eighth Circuit correctly applied the decision of Brown v. Ohio, 432 U.S. 161 (1977) to the two offenses with which McIntyre was charged: Stealing and First Degree Tampering. Neither issue rises to the standard of import which inheres to those matters which this Court, in its' discretion, has chosen to hear. Further, these issues have been resolved by this Court for some time and, therefore, do not meet the criteria of Supreme Court Rule 10.1(a).

Petitioners characterize the issue presented to the Eighth Circuit by Respondent as a "matter of state law" throughout their Petition. They claim that a state court's decision regarding whether an offense is a lesser included offense is strictly a matter of state law construction. The issue is not this narrow, however, as it is more appropriately deemed a double jeopardy question. A double jeopardy issue is a Constitutional matter and, as such, is an appropriate issue to raise under the federal habeas corpus statute. 28 U.S.C. § 2254.

The petitioners suggest in their Petition for Writ of

Certiorari, and Respondent acknowledges, that federal courts, in habeas proceedings, must defer to a state court's interpretation of state law and must also defer to a state court's finding of fact. However, while deference is to be given to state courts on matters of state law, federal courts are required to review state court decisions when constitutional issues are raised by a habeas corpus petitioner and federal courts may review state court determination of law de novo. 28 U.S.C. § 2241, La Vallee v. Delle Rose, 410 U.S. 690 (1973).

This Court stated in Townsend v. Sain, 372 U.S. 293, 318 (1963), that "[a]lthough the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently." Then, in Miller v. Fenton, 474 U.S. 104, 112 (1985), this Court recognized that "an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that the 'voluntariness' of a confession merits something less than independent federal consideration." State courts cannot decide cases in a manner which is inconsistent with the Constitution and federal courts have a duty to review a state court's application of federal law. See, e.g. Loving v. Virginia, 388 U.S. 1, 12 (1967) and Stanley v. Georgia, 394 U.S. 557, 568 (1969).

The question presented by the respondent in federal court was whether the state court violated his constitutional right to not be "twice put in jeopardy". As the Eleventh Circuit has stated, "[w]hether double jeopardy bars a subsequent prosecution is an issue for plenary review." United States v. Adams, 1 F.3d 1566, 1572 (11th Cir. 1993). A federal habeas court has the duty to review state court decisions to determine whether the state court has acted in a way so as to violate a petitioner's constitutional rights. The petitioners cite the case Estelle v. McGuire, 112 S.Ct. 475 (1991) to support their contention that the double jeopardy issue raised by the respondent was a state court interpretation of state law and that federal courts do not have jurisdiction to inquire into such matters. The Estelle case dealt with a Circuit Court's review of a state court's ruling on the admissibility of evidence at trial in state court. The Supreme Court faulted the Ninth Circuit for having entertained issues concerning the California state evidentiary rules. The Supreme Court stated, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id.

If the petitioners are suggesting that only state courts may review the elements of the state statutes for determinations of whether one crime is the "same offense" for double jeopardy purposes, they did not read Brown v. Ohio, 432 U.S. 166, 97 S.Ct.

2221 (1977) carefully enough. This Court in Brown undertook its own analysis of the Ohio statutes and agreed with the state court that joyriding was a lesser included offense of auto theft. The Court stated, "Applying the Blockburger test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by the court, constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause... For it is clearly not the case that 'each [statute] requires proof of a fact which the other does not.' (Citation to Blockburger omitted)." Brown v. Ohio, 97 S.Ct. at 2226. Petitioners' statement "Once the state court determines that tampering is not a lesser included offense of stealing, then the conclusion that respondent's double jeopardy rights were not violated naturally follows" (Page 18 of Petition) is supported by no case law and is wrong under Brown v. Ohio.

It is important to note that the Missouri Court of Appeals did not decide the McIntyre case on the facts of the case but, instead, merely relied on previously decided case law (which was not controlling case law as those cases analyzed the elements of tampering in the second degree not tampering in the first degree with which McIntyre was charged). Furthermore, the Missouri Court of Appeals did not apply the federal law of double jeopardy in the manner in which this Court has instructed. Blockburger v. United States, 284 U.S. 299 (1932), requires that courts compare the elements of the crimes to determine whether they are the same offense under the double jeopardy clause. The Missouri Court of

Appeals did not conduct the test and the federal court was, therefore, mandated to apply the correct constitutional test: the Blockburger test.

The petitioners second issue raised questions whether the Eighth Circuit properly decided the case under the holding of Brown v. Ohio, 432 U.S. 161 (1977).

The petitioners analyze the elements of tampering in the first degree and stealing by first setting out the jury instructions given in McIntyre's trials and then comparing the two instructions. It is peculiar that the petitioners chose to analyze the jury instructions rather than the statutes, but the respondent contends that this was done because the petitioners cannot argue that the elements in the two statutes both require something that the other does not. In other words, the petitioners have chosen what is expedient. This Court has never, to the respondent's knowledge, held that an analysis of offenses for double jeopardy purposes should focus on anything but the statutes themselves. In Illinois v. Vitale, 447 U.S. 410, 416, 100 S.Ct. 2260, 2265 (1980) the Supreme Court stated, "We recognized [in Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977)] that the Blockburger test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." (Emphasis added). The petitioners fault the Eighth Circuit for having "performed no analysis concerning the verbs submitted to the jury." (Page 24 of Petition). The lower court would have been misguided if it

had relied on the jury instructions rather than on the statutes, for it is only the statutes, as drafted by the legislature, and not the jury instructions which proscribe acts as criminal.

Under the Missouri statutes, the offense of stealing contains all of the elements required for a first degree tampering conviction. Stealing contains the additional element of purposeful deprivation but is otherwise identical to tampering in the first degree. As a matter of law, under Blockburger and United States v. Dixon, 113 S.Ct. 2849 (1993), a criminal defendant cannot be guilty of stealing an automobile under the Missouri statute unless he is also guilty of tampering in the first degree.

First, the tampering in the first degree statute does not require that a person "operate" the vehicle as the petitioners suggest. The statute requires that a person "receive, possess, sell, alter, deface, destroy or unlawfully operate" an automobile. RSMo section 569.080. The stealing statute requires not that a person "take" property as the Respondent suggests, but rather that a person "appropriate" property. RSMo section 570.030. "Appropriate" is defined as "to take, obtain, use, transfer, conceal, or retain possession of" in section 570.010(2) RSMo. If a person has "appropriated" property under the stealing statute he has necessarily "received, possessed, sold, altered, defaced, destroyed or unlawfully operated" the property as required under the tampering statute. It is impossible to imagine a person unlawfully operating a vehicle without also

"taking, obtaining, using or retaining possession of" the vehicle. To suggest that there is some inherent distinction between the two elements is ludicrous.

The petitioners also suggest that there is a difference in the state of mind required between the two offenses. Again, the petitioners misguidedly rely on the jury instructions rather than on the statutes. Both statutes require that the defendant act without the consent of the owner and both statutes require specific intent. The only difference between the two statutes is that the stealing statute requires a higher degree of mens rea which is the purpose to deprive. This issue was addressed by the lower court in its decision on page A-12, Petition for Writ of Certiorari.

As the petitioners have argued in each of the three briefs filed before the Eighth Circuit and in both previous Petitions to this Court, they again argue that the crimes are separate offenses because of the difference in time and space. Each time the Respondent has argued this point, the Eighth Circuit has rejected it citing Brown v. Ohio, "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." (McIntyre I at petitioner's A-49, McIntyre II at petitioner's A-30, McIntyre III, paraphrase at petitioner's A-13). The petitioners suggest that citing only to Brown is insufficient to establish that time and space should be disregarded in cases in which there is

continuity of the single crime. The petitioners cite to a California decision from 1971 to support their argument. Given the numerous times this passage from Brown v. Ohio has been cited, it is clear that this is still the law in double jeopardy cases.

Finally, respondent wishes to address what he perceives as a misstatement of the law by the petitioners. The petitioners state that "[l]ocal jurisdictions are free to create two offenses from one act" (Petition, p. 13) and "[l]ocal jurisdictions are allowed to create two offenses from one act". (Petition, p. 27). In both instances, the petitioners cite to the case of Missouri v. Hunter, 459 U.S. 359 (1983). Missouri v. Hunter does not stand for the proposition for which the petitioners suggest. In Missouri v. Hunter, this Court found that a prosecution under the Missouri statute proscribing Armed Criminal Action was not barred by double jeopardy when the defendant was charged with robbery in the first degree in the same proceeding. This Court relied heavily, if not exclusively on the intent of the legislature to authorize cumulative punishments in rejection of the defendant's double jeopardy claim. This Court cited Whalen v. United States, 445 U.S. 684 (1980) for the following proposition: "The assumption underlying the rule [of statutory construction] is that Congress ordinarily does not intent to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence

of a clear indication of contrary legislative intent." 445 U.S. at 691-692, emphasis added in Hunter.

Furthermore, in Missouri v. Hunter, this Court distinguished between the applicability of the double jeopardy clause in a situation wherein a criminal defendant faces multiple trials and a situation wherein a criminal defendant faces multiple punishments. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Id. The double jeopardy clause, therefore, provides more protection to individuals who are faced with multiple trials and serves to "protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." Burks v. United States, 355 U.S. 1, 11 (1978).

While "local jurisdictions are allowed to create two offenses from one act" as the petitioners suggest, they must still do so within the confines of the double jeopardy clause. Legislatures must define the offenses with elements that are different from the elements of other crimes so that they pass the Blockburger test and, if the legislature intends cumulative punishment, as was the case in Missouri v. Hunter, such an intent must be clearly stated in the legislative history and the offenses which permit the cumulative punishment must be tried in one proceeding.

CONCLUSION

The Eighth Circuit neither overstepped its federal jurisdiction nor did it misapply the law of double jeopardy in its reliance upon Brown v. Ohio. The decision follows a long line of cases from the United States Supreme Court and comports with its own prior decisions regarding the double jeopardy issue. In fact, the decision is uniform with decisions from other Circuits as well.

For all of these reasons, the respondent Terry D. McIntyre respectfully requests this Court to deny a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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